Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

Case No. 89-1445
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM : 1989

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COMMISSIONER OF CORRECTIONS, STATE OF NEW YORK and JUSTICES OF THE APPELLATE DIVISION, SECOND DEPARTMENT,

Petitioners,

- against -

DANIEL FULLAN,

Respondent.

----------X

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION ON BEHALF OF RESPONDENT, DANIEL FULLAN, TO PROCEED UPON THIS PETITION FOR CERTIORARI IN FORMA PAUPERIS.

IRVING ANOLIK, attorney for respondent and a member of the Bar of this Court, upon his annexed affidavit, respectfully moves this Court to permit respondent Daniel Fullan to proceed in forma pauperis.

Dated: May 25, 1990
New York, New York

Respectfully Submitted,

IRVING ANOLIK
Attorney for Respondent
225 Broadway
New York, New York 10007
(212) 732-3050

TO: Hon. Robert Abrams
Attorney General, State of New York
Attorney for Petitioner
120 Broadway
New York, New York 10271

Att: Lawrence S. Kahn, Esq.
Deputy Solicitor General

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STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

IRVING ANOLIK, an attorney at law, being duly sworn affirms that the following is true except as to matters upon information and belief and as to those he believes it to be true. My information and belief is based upon documents in the file and having handled this case in the United States Court of Appeals, Second Circuit.

Daniel Fullan, by concession of the State of New York was found to be an indigent appellant by the United States Court of Appeals for the Second Circuit and upon his application, through counsel, he was granted the right to appeal to the United States Court of Appeals in forma pauperis.

For that reason, pursuant to the rules of this Court, we respectfully move this Court to permit Daniel Fullan to petition

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for this Writ of Certiorari in forma pauperis as well. He does not, however, require the assignment of counsel.

No prior application for this relief has been made in this Court.

IRVING ANOLIK

Sworn to before me
this 25th day of May, 1990

NOTARY PUBLIC

State of New York
No. 60-4795744
Qualified in Westchester County
Commission Expires SEPT 30, 1991

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No. 89-1445

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

THE COMMISSIONER OF CORRECTIONS, STATE OF NEW YORK, and JUSTICES OF THE APPELLATE DIVISION, SECOND DEPARTMENT,

Petitioners,

VS.

DANIEL FULLAN,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Respondent submits that the appropriate questions presented should be as follows:

1. Does a State Court rule denying a free trial transcript to a criminal defendant who is conceded to be a pauper, but for whom counsel has been retained by persons other than the defendant, violate the Fourteenth Amendment?

(Put another way as apparently found by the United States District Judge Robert Sweet) (Page 3 of his opinion):

2. Whether an indigent criminal defendant whose friends and family are willing to hire a lawyer for his appeal at their own expense has a right to obtain a free copy of his trial minutes?

3. Whether the State of New York has a right to treat the funds of family and friends as assets of the defendant even if he has no discretionary use or control over them?

4. Whether the State of New York has a right to dictate to family and friends of a criminal defendant how to spend their own money and to thereby require that a criminal defendant choose between forgoing retained counsel or forgoing an appeal?

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1. **Only the Appellate Division of the Supreme Court of the State of New York, Second Department has a rule which denies an indigent criminal defendant the right to obtain a free copy of his trial transcript if for any reason counsel has been retained to represent him by benefactors over whose funds he has no control. This is a denial of equal protection under the Fourteenth Amendment of the United States Consititution and also contrary to the due process clause of the Fourteenth Amendment, as well as to the prior opinions of this Court.**

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COUNTER STATEMENT OF THE CASE

While the statement of the case of the petitioners is correct to some extent, there are certain essential facts that have either been omitted or distorted. We, on behalf of respondent therefore wish to set forth a counter statement of facts to a short but significant extent as follows:

The State of New York has never questioned or denied the fact that respondent Daniel Fullan is personally indigent.

There was a concession in the United States Court of Appeals for the Second Circuit by the State of New York that Daniel Fullan had no funds of his own and therefore Daniel Fullan was assigned counsel in the United States Court of Appeals and was ruled to be a pauper. He was assigned counsel and proceeded as a pauper.

Indeed in this tribunal, petitioner Daniel Fullan is a pauper and is unable to pay any of the expenses in connection with this petition for Certiorari but must depend upon the good nature of his counsel, his friends and family. He denies that he has any control over any of the funds of his friends and family.

The Appellate Division of the Second Department of the Supreme Court of the State of New York is apparently the only New York Court that has interpreted the rules to mean that an indigent criminal defendant is barred from receiving a free copy of his trial transcript despite the fact that he is totally indigent and

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has no control over the funds of his friends or family who may be disposed to hire a lawyer for him.

The interpretation of the Appellate Division of the Second Department is incredible in view of the fact that other Courts in the State of New York do grant free copies of the transcript to indigent criminal defendants irrespective of the fact that benefactors (friends and relatives) may have undertaken to hire a lawyer for him.

It is obvious that the rule of the Second Department and the position of the petitioners herein is probably more costly to the taxpayers because of the fact that when counsel is assigned, not only does the State of New York have to pay for a free copy of the transcript of the trial, but must also pay the fee of counsel. Furthermore it must also pay the costs of his brief and appendix.

On the other hand where counsel is provided by benefactors with their own funds, the State of New York does not have to pay a counsel fee.

What the petitioners seem to have misinterpreted is that the statutes they cite, namely 22 N.Y.C.R.R. §671.3(b)(3) deals with defendants in a criminal case who are able to retain counsel. No one, as we have indicated before, has ever doubted the fact that Fullan is indigent and therefore cannot retain his own counsel. The State, however, is actually urging that no benefactor can undertake to hire a lawyer for a defendant until that benefactor first pays all of the expenses of the appeal. In other words the State of New York is dictating to these benefactors how to spend

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their own money despite the fact that it is clear that the respondent has no control over the funds involved.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

1. **Only the Appellate Division of the Supreme Court of the State of New York, Second Department has a rule which denies an indigent criminal defendant the right to obtain a free a copy of his trial transcript if for any reason counsel has been retained to represent him by benefactors over whose funds he has no control. This is a denial of equal protection under the Fourteenth Amendment of the United States Constitution and also contrary to the due process clause of the Fourteenth Amendment, as well as to the prior opinions of this Court.**

The respondent, Daniel Fullan, was convicted of second degree murder, kidnapping and robbery in the Supreme Court, County of Queens, State of New York in January, 1988. He was sentenced to a term of 45 years to life and is currently incarcerated.

He is attempting to appeal the judgment of conviction to the New York Supreme Court, Appellate Division for the Second Department. Fullan's family and friends raised $10,000.00 of their own money to retain an attorney to represent him on that appeal.

As the Court below found, Fullan did not need assigned counsel, but asked permission to appeal as a poor person in other respects and requested the Court to provide him with a free copy of this trial transcript and to dispense with the need for printing his appeal.

The Second Department summarily denied Fullan's motion, but stated that its denial was without prejudice to a renewed motion showing Fullan's financial condition.

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The respondent thereafter filed a new motion, supported by his detailed affidavit stating that $27,500.00 had been paid to his trial lawyer and that this sum had been raised by liquidating his total net worth and by borrowing; that he had no assets left other then approximately $360.31, in his commissary account at the Clinton Correctional Facility. Furthermore he stated that he receives no money while he is incarcerated and that the $10,000.00 to retain his appellate counsel had been raised by his family and friends.

This motion was also summarily denied without reasons given.

The New York Court of Appeals denied leave to appeal since they had no jurisdiction over the case.

The United States Court of Appeals concluded (6a):

> "For the reasons stated below, we conclude if Fullan himself had no funds with which to prosecute the appeal and had no control over the funds used to retain counsel for him, the State's denial of his application for a free transcript violates his right to due process and equal protection."

The main thrust of the United States Court of Appeal's holding is set forth on Pages 8a and 9a of its opinion as it appears in the appendix:

> "As a general matter, 'differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution.' Roberts v. Lavallee, 389 U.S. 40, 42 (1967) (per curiam); see, e.g., Ross v. Moffit, 417 U.S. 600 (1974); Mayer v. City of Chicago, 404 U.S. 189 (1971); Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963); Griffin v. Illinois, 351 U.S. 12 (1956) (plurality opinion); id. at 20 (Frankfurter, J., concurring in the judgment). A

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> trial transcript may be such an instrument. Through a state is not required by the Constitution to provide a right of appeal, it is well established that when such a right of appeal is provided, an indigent defendant is entitled to 'as adequate appellate review as defendants who have money enough to buy transcripts.' Griffin v. Illinois, 351 U.S. at 19 (plurality opinion); see, e.g., Gardner v. California, 393 U.S. 367 (1969); Roberts v. LaVallee, 398 U.S. 40; Lane v. Brown, 372 U.S. 477. Thus, the State may be required to provide a defendant with a trial transcript at state expense. But see Draper v. Washington, 372 U.S. at 495 ('[a]lternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of events at trial from which the appellant's contentions arise')."

In the case at bar, the defendant (petitioner here) has sworn that he is unable to pay for the minutes of the trial. He does not have the money that was given to counsel. He does not have access to that money and most of it has already been expended in work performed in behalf of his cause.

Furthermore the well-wishers who provided the money to counsel said it was not earmarked specifically to pay costs or to pay for minutes. The petitioner remains in the same indigent condition he was in at all times.

In Mayer v. Chicago, 404 U.S. 189, 92 S.Ct. 410, a unanimous Supreme Court, per Justice Brennan, carried the Griffin principle further than it ever has the Gideon principle, by holding that an indigent appellant "cannot be denied a 'record of sufficient completeness' to permit proper consideration of his claims" because he was convicted of ordinances or violations punishable by fine only. 'The size of the defendant's pocketbook bears no more relationship to his guilt or innocence in a non-felony than in a felony case.'

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The court further declared, which is very significant, as follows:

> "Griffin does not represent a balance between the needs of the accused and the interests of society; its principle is that of a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way. The invidiousness of the discrimination exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed. The States' fiscal interest is, therefore irrelevant." (Emphasis ours)

In Douglas v. California, 272 U.S. 353, 83 S.Ct. 814, the Supreme Court of the United States held that not only is an indigent defendant entitled to a free copy of his transcript, but in addition he is entitled to an assigned lawyer if he so requests. Douglas v. California is not dependent upon Griffin v. Illinois, supra. Prior to Gideon v. Wainwright, 272 U.S. 335, 83 S.Ct. 792, the Griffin case posed a challenge to Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252. See "Modern Criminal Procedure", Sixth Edition, (Kamisar, LaFave, & Israel, pages 72-135).

It was wondered how could the Betts line of cases be reconciled with the language, if not the holding, of Griffin? Since there was an unqualified right to one's own paid counsel of his own choosing at a state trial, capital or not, did Griffin not imply that an indigent also has this unqualified right? In Betts the court required "special circumstances to exist" before the indigent was entitled to appointed counsel in a non-capital state case.

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When the Supreme Court finally overruled the Betts case, somewhat surprisingly it did not rely on Griffin at all but upon Douglas v. California, supra.

While in Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, the Supreme Court held that there is no right to counsel beyond the first appeal as of right, nor from state court appeals on Certiorari in the U.S. Supreme Court, the law is nevertheless clear that upon the first appeal, this right must be accorded.

In Lane v. Brown, 372 U.S. 477, 83 S.Ct. 768, the Supreme Court held that the requests for a free transcript cannot be confined to those requests made only by the public defender.

Even if the appeal is frivolous, which the one at bar certainly is not, there would still be an entitlement to a free transcript. (Draper v. Washington, 372 U.S. 487, 83 S.Ct. 774).

In view of the foregoing, it is obvious that the assignment of counsel or the retention of counsel is separate and apart from the need to provide a free trial transcript to an indigent defendant.

In the case at bar, no hearing whatsoever was held either in the State Appellate Division or the District Court below.

The State of New York has never been able to contradict the respondent on his sworn statement that he is indigent. Indeed in those Courts, the State did not question the indigency of Fullan.

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The Appellate Division is placing a condition which the Supreme Court of the United States refused to place on the effectiveness of Griffin v. Illinois, supra. The state has linked Douglas v. California together with Griffin v. Illinois, and has stated that a free transcript my be provided only if assigned counsel is necessary. That has never been the holding of the Supreme Court of the United States and indeed the Supreme Court of the United States has recognized that a respondent has the right to choose a lawyer if he can afford one. He is not required to accept an assigned lawyer if he doesn't want one. (See, Lane v. Brown, supra). (cf: Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525).

We submit that Fullan has placed himself in jeopardy of perjury by the sworn statements he made that he is indigent and cannot afford to buy the minutes. If the state has any doubt as to the truth of this statements, let them prosecute him for perjury. We submit that they cannot arbitrarily refuse to grant him a free copy of his minutes in violation of Griffin v. Illinois, supra.

We submit, therefore, that the respondent, who has been denied his appellate rights for an unconscionable length of time by the distorted interpretation of the Fourteenth Amendment and Griffin v. Illinois, should be granted the Writ with directions that unless a copy of the trial transcript is provided to him free of charge as soon as practicable, the respondent should be released from custody.

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Griffin v. Illinois, supra, made it very clear that while no right to appeal is constitutionally mandated, once that right is granted to any litigant, however, it must be granted equally to all.

Thus in Griffin the U.S. Supreme Court stated that:

> "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."

We, therefore, emphasize that the courts below, namely the District Court and the Appellate Division, have misinterpreted the Supreme Court decisions because it is clear that the assignment of counsel which is recognized under Douglas v. California, supra, and the right to a free transcript of the trial which is mandated by Griffin v. Illinois, supra, are not inter-dependent. Griffin was decided in 1956 and Douglas was decided in 1963.

As we have already established previously, when the Supreme Court decided Douglas v. California, it did not rely upon Griffin at all, but rather overruled Betts v. Brady, supra.

There is nothing whatsoever in any of the cases that hold that a person is not entitled to a free transcript of his trial unless he also applied for assigned counsel. That was not the rule in Griffin v. Illinois, and it is not the rule now.

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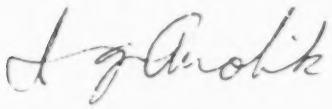
CONCLUSION

The Writ of Certiorari should be denied.

Respectfully submitted,



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OCTOBER TERM : 1989

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Petitioners,

- against -

DANIEL FULLAN,

Respondent.

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RESPONSE TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ATTORNEY'S CERTIFICATION

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

IRVING ANOLIK, a member of the Bar of this Court, certifies that a true copy of the within Response to the Petition for Cetiorari to the United States Court of Appeals for the Second Circuit was duly served by personal delivery and by first class mail upon the attorney for respondent at that attorney's designated address: Robert Abrams, Attorney General State of New York, 120 Broadway, New York, New York 10005.

Dated: May 25, 1990

IRVING ANOLIK

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COMMISSIONER OF CORRECTIONS,
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- against -

DANIEL FULLAN,

Respondent.

----------X

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

JONAH M. RIDLEY, being duly sworn, deposes says:

I am not a party to this action; I am over 18 years of age; I reside in Irvington, New Jersey.

On May 25, 1990, I served the within Response to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, upon the attorney for respondent at that attorney's designated address: Robert Abrams, Attorney General, State of New York at 120 Broadway, New York, New York 10271, for that purpose by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in an official depositary under the exclusive case and custody of the United States Postal Service within the State of New York.

Jonah M. Ridley
JONAH M. RIDLEY

Sworn to before me
this 25th day of May, 1990.

Irving Anolik
NOTARY PUBLIC

IRVING ANOLIK
Notary Public, State of New York
No. 44-0079900
Qualified in Rockland County
Commission Expires November 30, 1991

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